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SUPREME COURT, U. S.

FILED
OCT 1 1970
E. ROBERT SEAVER, CLERK

No. 421

In the Supreme Court of the United States

OCTOBER TERM, 1970

TREFINA, A. G., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court filed no opinion. The opinion of the court of appeals (Pet. App. 4–14) is reported at 427 F. 2d 1118.

JURISDICTION

The opinion of the court of appeals was entered on March 2, 1970. A petition for rehearing was timely filed (pursuant to a grant of extension) on March 27, 1970, and denied on May 6, 1970. The petition for a writ of certiorari was filed on July 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a suit between private litigants to recover on a debt, the government may intervene to protect a preexisting tax lien on that debt.

2. Whether, under the Federal Rules of Civil Procedure, a deposition of a corporate party may be taken only at either the corporation's place of business or the residence of the deponent.

3. Whether the district court properly exercised its discretion in entering a default judgment against a corporate party after its repeated failure without good reason to produce its officer for deposing at a place determined by the district court to be fair in all the circumstances.

4. Whether the district court, in an action to determine the priority of competing parties' interest in property subject to the power of the court, may exercise jurisdiction to determine this priority as between parties that are properly before the court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Pertinent provisions of the Constitution of the United States, the United States Code, and the Federal Rules of Civil Procedure are set forth in the petition (pp. 9-19).

STATEMENT

The petition arises from a multi-party action in which the amount and ownership of a certain contractual obligation were at issue. The underlying controversy involved a commission agreement dated February 13, 1959, under which Southeastern Drilling Corporation

was obligated to pay the following persons (among others) the indicated percentages of net profits from certain drilling work: Antonio A. Diaz, 4 percent; Charles F. O'Neall, 5 percent; and William N. Dillin, 5 percent (Pet. App. 4; R. 41).

On December 21, 1966, Diaz, a citizen of Argentina, initiated this action against Southeastern in the United States District Court for the Northern District of Texas, in which district Southeastern maintained its principal offices. The complaint alleged that Diaz was entitled to 4 percent of net profits under the agreement plus an additional 2 percent as assignee of one-fifth of Dillin's and O'Neall's interests thereunder. Diaz prayed for an accounting of the net profits and judgment for the amounts due him (R. 30–40).

On the following day, Great American Investment Co., Ltd., a Bahamian corporation, filed a separate action in the same court seeking similar relief as assignee of Dillin's 5 percent interest, without acknowledging Diaz' alleged one-fifth interest therein. Shortly thereafter, Southeastern moved to consolidate the two actions for trial (R. 55–57).

At this stage of the proceedings, Trefina, A.G., a Swiss corporation and the petitioner here, moved to intervene in the Diaz action, claiming 5 percent of the net profits as O'Neall's assignee and asserting defenses to the Diaz claim to one-fifth thereof. The motion alleged that Trefina would be adversely affected by a distribution or other disposition of the property involved in the Diaz action. (R. 65–67, 71–82.) On May 4, 1967, the district court granted Southeast-

ern's motion to consolidate and Trefina's motion to intervene (R. 68–70).

On January 10, 1968, the parties to the consolidated action, including Trefina, filed with the district court an Agreement and Joint Motion for Separate Trials. Pursuant to the agreement, Southeastern placed certain funds in escrow bank accounts pending the outcome of the litigation. The escrowed funds were to be used to satisfy the obligation of Southeastern, if any, under the commission agreement. The joint motion requested separate trials (1) to determine the ownership of the disputed 2 percent interest, and (2) to determine the amount of the liability, if any, of Southeastern. (R. 90–96). A pretrial order, which was filed on the same date, noted that a "tax claim" against the amount sought by Trefina had prevented Southeastern's paying that amount (R. 97–132; see R. 102).

On January 31, 1968, the government filed a motion to intervene, accompanied by a complaint alleging: (1) that valid federal tax liens existed against the property of O'Neall and Dillin; (2) that Southeastern was indebted to O'Neall and Dillin under the agreement; (3) that notice of levy had been served on Southeastern on April 7, 1967, levying upon and seizing all property of O'Neall and Dillin, specifically including any amounts due under the agreement; and (4) that Southeastern had failed to comply with that levy. The government sought to foreclose these liens and, in furtherance thereof, requested the court to determine the validity and priority of the liens and claims of all parties to the consolidated action. The

government also moved to join O'Neall and Dillin as parties defendant in the event intervention were granted, on the ground that they did or might claim an interest in the property in question (R. 133–135, 147–152.) On February 14, 1968, the district court granted the government leave to intervene and ordered O'Neall and Dillin joined as parties (R. 22, 143–144).

On July 12, 1968, the government served a notice upon Trefina's counsel to take the deposition of Mr. Widmer, an officer of the corporation, on August 5, 1968, at the office of the United States Attorney in Dallas, Texas (R. 258–259).

On the scheduled date, Mr. Widmer failed to appear and Trefina moved to quash the notice to take the deposition. In response, the government filed an opposition to this motion and moved for default judgment against Trefina based upon its failure to produce the noticed deponent. After a hearing, the district court, by order dated August 6, 1968, denied both motions and ruled that "the deposition of Mr. Widmer shall be taken at a convenient time and place not to exceed 60 days from the date hereof in New York, New York * * *" (R. 161–162).

On September 16, 1968, the government noticed the taking of Widmer's deposition in New York City on October 4, 1968 (R. 261–262). Widmer again failed to appear, whereupon the government renewed its motion for default judgment (R. 166–168).

Between October 3 and 15, 1968, Trefina filed the following documents: motion to vacate the order allowing intervention (R. 163–165); motion to dismiss

the complaint in intervention (R. 171–172); objection to the government's motion for leave to intervene (R. 173–177); and motion to vacate the order of August 6, 1968, requiring Widmer to depose in New York City, and to change the place thereof to Switzerland, Trefina's principal place of business (R. 183–188).

After a hearing, the district court denied each of Trefina's motions and deferred for 30 days its ruling on the government's motion to renew its motion for default judgment. The court's order specified that "the deposition of Mr. Widmar (sic) shall be taken in New York * * *" during the 30-day period (R. 201–202). Thereafter, on two occasions during the 30-day period, Trefina's counsel informed the government that Mr. Widmer would not be made available for deposing in New York City (R. 209–210).

After the 30 days had elapsed, the government requested a hearing on its pending motion for default judgment. After this hearing, the district court entered default judgment against Trefina, based on its repeated noncompliance with the discovery procedures. (Pet. App. 1–3; R. 206–208.) On appeal, the court of appeals affirmed (Pet. App. 4–14).

ARGUMENT

1. Trefina first questions the propriety of the government's intervention in this case (Pet. 36–37).

Rule 24(a)(1) of the Federal Rules of Civil Procedure authorizes intervention of right whenever a federal statute confers the unconditional right to intervene. Since Section 7424 of the Internal Revenue Code of 1954 (26 U.S.C. 7424) (Pet. 10) grants the govern-

ment such a right to intervene in a civil action to assert a tax lien against property which is the subject of the action, intervention was proper here.

In any event, the court of appeals correctly held that intervention of right was authorized by Rule 24(a)(2). The test for intervention under this rule is whether the party seeking intervention will, in a practical sense, be affected by the determination of the action. See Advisory Committee Note to 1966 Revision Rule 24(a), printed in 3B Moore, *Federal Practice* (2d ed.), ¶24.01 [10]. See, also, *Nuesse v. Camp*, 385 F. 2d 694, 700 (C.A. D.C.); *Atlantis Development Corp. v. United States*, 379 F. 2d 818, 824-825 (C.A. 5). A party, such as the government here, who claims an interest in property which is the subject of an action to recover that property, should ordinarily be allowed to intervene under Rule 24(a)(2). Compare *Atlantis Development Corp. v. United States*, *supra*. This is all the more true in a suit such as this one where, in the absence of intervention, the government might well have had to attempt to bring three separate actions—in Switzerland against Trefina, in the Bahamas against Great American, and in Argentina against Diaz—to vindicate its allegedly prior tax lien. It is obvious that denial of intervention would have substantially prejudiced the government from a practical standpoint, and that judicial economy is promoted in such a case by settling the ownership issue in one suit.

[1] The court of appeals, while acknowledging that its "language seems unconditional," expressly found it unnecessary to decide "whether Section 7424 gives an unconditional right to intervene, * * *" (Pet. App. 7-8).

Accordingly, the government's intervention under Rule 24(a)(2) was proper.

2. Trecina urges (Pet. 38) that a deposition of a corporate party must be taken at either the corporation's place of business or the residence of the deponent. Such an inflexible rule, however, is not specified in the language of the Rules and would be inconsistent with their general objective of permitting the district courts to adapt the prescribed procedures in a practical and equitable manner to the circumstances of individual cases.

When controversies have arisen as to the place of deposing, the Rules have, accordingly, been interpreted as giving the district courts flexibility to determine, in their sound discretion, a place which is fair in all the circumstances of the particular case. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602, 614 (C.A. 2), certiorari granted, 379 U.S. 912, certiorari dismissed as improvidently granted, 380 U.S. 248, 249; *Hyam* v. *American Export Lines*, 213 F. 2d 221–222 (C.A. 2); *Connell* v. *Billmore Security Life Insurance Co.*, 41 F.R.D. 136, 137 (D.S.C.); 2A Barron & Holtzoff, *Federal Practice and Procedure*, § 713, p. 212. Of course, the exercise of this discretion has often resulted in requiring the deposition to be

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Since intervenors become parties to the action for all purposes, *United States for Use of Ward Caiste Service, Inc.* v. *U.S. Fidelity & Guaranty Co.*, 28 F.R.D. 568, 570 (E.D. Ky.), the ordinary rights of cross-claim, counterclaim, etc., are, of course, available between intervenors as they are between other parties. See 3B Moore, *Federal Practice* (2d ed.), ¶ 24.17 [3.-1]–24.17[3.-3].

taken at the corporation's place of business. In the same spirit, however, the courts have not hesitated to require deposing elsewhere when appropriate. See, *e.g.*, *General Houses v. Madych Manufacturing Corp.*, 239 F. 2d 510, 514 (C.A. 2); *Producers Releasing Corp. De Cuba v. PRC Pictures*, 176 F. 2d 93, 95 (C.A. 2); *Tapiagos v. Douglas Aircraft Co.*, 45 F.R.D. 94 (S.D. N.Y.); *Schadé v. Koninklijke Luchtvaart Maatschappij, Etc.*, 21 F.R.D. 20 (S.D. N.Y.); *Society of Independ. M.P.A. v. United Detroit Th. Corp.*, 8 F.R.D. 453, 455-457 (E.D. Mich.).

3. Pretina contends (Pet. 8) that the default judgment was improper because it was entered as punishment and is therefore contrary to the principles of *Société Internationale v. Rogers*, 357 U.S. 197, and *Hovey v. Elliott*, 167 U.S. 409. This contention simply ignores the major premise of *Société Internationale*, that default judgment for failure to make discovery is permissible under Rule 37 when the delinquent party advances no substantial honest reason for the failure, thus raising the presumption that the failure is an attempt to disguise an unmeritorious litigation position. See also *Hannibal Packing Co. v. Atchison*, 212 U.S. 322. Indeed, the entry of a default judgment may be imperative in such circumstances. See

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[5] Although some courts have said that there is a "general rule" that the deposition should take place at the corporation's place of business, see *Bankard v. M. Dyckes & Sons*, 31 F.R.D. 330, 332 (S.D. N.Y.), this should not be permitted to obscure the fact that the basic test under the Rules remains the determination of where, in all the circumstances of the case, it is fair to require the deposition be taken. See 4 Moore, *Federal Practice* (2d ed.), 30.07 [4.-1].

cause the party seeking discovery might otherwise be deprived of substantial rights. In *Societe Internationale*, the delinquent party escaped default judgment only because, in the unusual circumstances of that case, it established substantial bona fide reasons for its failure to make discovery. Here, however, Trefina urges only the distance to be traveled by the deponent. Analytically, of course, this objection relates only to the propriety of requiring deposing in New York since, if this could validly be done, the sanctions ordinarily available to protect the integrity of the discovery procedures apply.

Several circumstances of this case—including the fact that a third party, Diaz, might wish to be present at the deposition, uncertainty as to the scope the deposition could take in Switzerland, and the fact that the subject matter of the action was in the United States—militated against requiring the deposition to take place in Switzerland. Moreover, Trefina did not attempt to show business inconvenience.[1] Compare *Baryan v. Max Factor & Co.*, *supra*. Accordingly, the district court did not abuse its discretion in requiring the deposition to take place in the United States.

It follows that, the district court having found (Pet. App. 2) Trefina's noncompliance with the discovery order to have been wilful and unjustified, entry of the default judgment was proper. Compare *Trans World Airlines, Inc. v. Hughes*, *supra*; *Pioche Mines Consolidated, Inc. v. Polmar*, 333 F. 2d 257 (C.A. 9), cer-

[1] Indeed, Trefina was effectively foreclosed from making this showing by its counsel's repeated insistence that he had no knowledge as to whether Widmer was an officer of Trefina.

tiorari denied, 380 U.S. 956; *United States* v. *Continental Casualty Co.*, 303 F. 2d 91 (C.A. 4).

Trefina's further contention that Rules 54(c), 55(a) and 55(d) prohibit the default judgment misapprehends the application of these rules to an *in rem* proceeding such as this. The government's complaint in intervention specifically requested the court to determine the priorities of the competing parties' claims, and its further request that the monies be paid to it constitutes a clear demand that its interest be accorded priority. Having determined by default judgment that the government's interest was prior to Trefina's, the district court effectuated this judgment by requiring Trefina to execute the necessary instruments to transfer its interest in the escrowed funds. This is not relief essentially different in kind from that requested.

4. Trefina also urges (Pet. 31–35) that the district court lacked jurisdiction. This argument, however, is based entirely upon the erroneous premise that the government's complaint in intervention asserted an *in personam* claim. The government's claim was one to foreclose a preexisting tax lien on a contractual debt owed by Southeastern, a corporation subject to the *in personam* jurisdiction of the district court. In furtherance of this foreclosure and in accord with Section 7403 of the Internal Revenue Code of 1954 (26 U.S.C. 7403), the government's claim in intervention opened the case to everyone who might have an interest in the property and requested that the government's interest therein be declared prior to the interests of all

others. This is clearly an *in rem* proceeding. See *Hanson v. Denckla*, 357 U.S. 235, 246, n. 12.[5]

Since the government's claim is *in rem* in nature, the sole inquiry is whether the necessary elements of *in rem* jurisdiction—power and notice—are present. Southeastern's presence in the district gave the district court power over the property sought to be foreclosed.[6] See *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 241; *Pennington v. Fourth Nat. Bank*, 243 U.S. 269, 271; *Harris v. Balk*, 198 U.S. 215, 222–223. Due process notice requirements were satisfied by service upon the attorneys of the existing parties to the action (including Trefina) and by serving absentees by registered mail as 28 U.S.C. 1655 provides.

We note, finally, that practical considerations (see *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 312–313) also support the district court's jurisdiction of this entire controversy. That court was in the best

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[5] Every *in rem* action, of course, operates in the final analysis as an *in personam* adjudication, binding parties as to the property involved. See *Foley v. Justices of Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, J.), appeal dismissed, 179 U.S. 405. See, also, von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1135–1136, 1155–1156 (1966).

[6] Trefina's argument that power over the res requires attachment is based on a faulty analysis of *Pennoyer v. Neff*, 95 U.S. 714. *Pennoyer* was a *quasi in rem* proceeding—an *in personam* proceeding determining the defendant's personal liability to the extent of the property involved—as opposed to an *in rem* proceeding such as the present one (i.e., one solely to determine the ownership of property). Indeed, the Court in *Pennoyer* distinguished *in rem* proceedings in this respect. 95 U.S. at 727. See *Huff v. Hutty*, 176 U.S. 398, 405–406.

position to interpret the commission agreement under Texas law, to require the necessary computations for accounting (since the officers, offices, and records are physically located in the district) and, most importantly, to enforce its determination as to ownership. And, of course, permitting the court with power over the property to exercise jurisdiction to determine its ownership promotes judicial economy and insures against inconsistent results.

Accordingly, the district court had jurisdiction to render the default judgment and, for the reasons previously stated, properly did so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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